Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE COURT OF APPEALS OF INDIANA

PATRICK COX,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0612-PC-1071
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Thomas Newman, Jr., Special Judge
Cause No. 48D01-9509-CR-287

June 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Patrick Cox, *pro se*, appeals the denial of his petition for post-conviction relief. He raises two issues: 1) whether his sentence of life without parole violated his due process rights under the federal and state constitutions; and 2) whether his appellate counsel was ineffective.

We affirm.

FACTS AND PROCEDURAL HISTORY

Cox was convicted after a jury trial in November of 1996 of murder. When the jury was unable to decide on his penalty, the trial court sentenced Cox to life without parole. His conviction and sentence were affirmed on direct appeal. *Cox v. State*, 696 N.E.2d 853 (Ind. 1998).

DISCUSSION AND DECISION

1. Due Process

Cox argues his due process rights were violated when a trial court, rather than a jury, sentenced him to life without parole.[1] In support, he cites *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied* 542 U.S 961 (2004).

Cox's direct appeal had been final for approximately six years before the United States Supreme Court decided *Blakely* and two years before it decided *Apprendi*. He may not raise these issues in his petition for post-conviction relief. See *Smylie v. State*, 823 N.E.2d 679, 690-91 (Ind. 2005) ("as a new rule of constitutional procedure, we will apply

[1] Cox does not offer an independent argument under the Indiana Constitution. We accordingly address only his argument under the United States Constitution.

Blakely retroactively to all cases *on direct review at the time Blakely was announced*") (emphasis supplied), *cert. denied* 126 S.Ct. 545 (2005).

2. Effective Assistance of Appellate Counsel

Cox argues his appellate counsel was ineffective for failing to raise an *Apprendi* or *Blakely* challenge to his sentence. Counsel's decision as to what issues to raise on appeal is to be measured by the precedent available at the time the decision was made. When Cox's counsel was deciding what issues to raise on appeal, *Apprendi* and *Blakely* had not been decided. Counsel does not perform deficiently by failing to anticipate a change in the law, *Stevens v. State*, 770 N.E.2d 739, 760 (Ind. 2002), *reh'g denied, cert. denied* 546 U.S. 830 (2003), particularly one like *Blakely*, which "radically reshaped our understanding of a critical element of criminal procedure, and ran contrary to established precedent." *Smylie*, 823 N.E.2d at 687.

Cox's appellate counsel was not ineffective for failing to raise *Apprendi* or *Blakely* issues on direct appeal.

Affirmed.

BAILEY, J., and SHARPNACK, J., concur.